United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1156

To be argued by
PETER R. CASEY, III

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1156

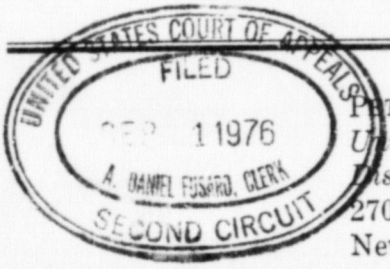
UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN ANTHONY HOUSAND,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FROM THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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Statutes and Rules

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U.S.C. § 1503. Influencing or injuring officer, juror of witness generally

Whoever corruptly, or by threats or force, or by way threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commis-

sioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c 645, 62 Stat. 769.

18 U.S.C. § 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration if false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1156

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN ANTHONY HOUSAND,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On December 11, 1974 a federal grand jury, sitting at Hartford, Connecticut, returned an indictment (Criminal No. H-74-185) against JOHN ANTHONY HOUSAND, the appellant herein, and six other individuals. HOUSAND was charged in four of the six counts of the indictment as follows:

Count Three	Title 18, United States Code, Sections 1503 and 2
Count Four	Title 18, United States Code, Sections 1001 and 2
Count Five	Title 18, United States Code, Section 1623
Count Six	Title 18, United States Code, Section 371

The next day he was arraigned and pled not guilty to all counts. Bond was set at $100,000 with full surety. At this time he was represented by attorney Ralph Elliot of Hartford, Connecticut. On December 13, 1974, Attorney F. Timothy McNamara was appointed to assist in the representation of MR. HOUSAND. On December 12, 1974, a hearing was held on a Motion for a Psychiatric Exam filed on behalf of MR. HOUSAND. On January 6, 1975 an order was entered granting leave to examine and copy psychiatric records.

On March 21, 1975 the grand jury returned a true bill (Criminal No. H-75-40) charging JOHN ANTHONY HOUSAND with one count of conspiracy to violate Sections 1001 and 1503 of Title 18, United States Code (18 U.S.C., Section 371) and three counts of perjury (18 U.S.C. Section 1623). Andrew Bucci was indicted on the conspiracy count. On motion of the government, the previous indictment (Criminal No. H-74-185) was dismissed without prejudice. MR. HOUSAND pled not guilty to the charges on March 31, and, at his request, the Court released Mr. Elliot and Mr. McNamara from further representation of him. Subsequently, on April 1, 1975, Attorney Maxwell Heiman was appointed as counsel for MR. HOUSAND. The government filed Notice of Readiness on April 11, 1975. Motions were filed by Andrew Bucci on April 5, and by JOHN HOUSAND on April 7, 1975. On May 27, 1975, Motions were put over until June 9, at the request of counsel. On that date, a hearing on motions was held with decision being reserved. On June 13, 1975 endorsements were entered and filed on MR. HOUSAND's motions.

The case was assigned, on September 22, to be the first jury case on September 23, 1975. On that date, the case was put over until the week of November 10th. On November 4, 1975, the case was again continued, with no date certain being set, due to other trial commitments on the part of Mr. Heiman.

On January 19, 1976, the case was again placed on the jury list with the jury to be chosen on January 27, 1976. On that date a jury was empanelled and sworn. The government began presenting evidence on January 28, 1976 and rested its case on February 6, after seven trial days. The government called 17 witnesses to testify in its case-in-chief. The defense rested on February 11, 1976 after calling nine witnesses, including the defendant HOUSAND. The government began its rebuttal case that day, and rested on February 12, 1975 after calling five witnesses. On that same day, the jury heard summations, received instructions, and began deliberating. After approximately three and one half hours, the jury returned verdicts of guilty on all counts.

Subsequently, defendant's motions for Judgment of Acquittal and Arrest of Judgment were denied, and, on March 22, 1975, the defendant-appellant was sentenced to five years on Count One, five years on Count Four, to run consecutively with Count One; and five years each on Counts Two and Three, to run concurrently with Count Four. This appeal followed.

Statement of Facts*

JOHN ANTHONY HOUSAND was the principle government witness at the trials of Robert Joost and David Guillette, in December, 1973, and William Marrapese and Nicholas Zinni, in May, 1974, for the murder of a government witness, Daniel LaPolla. HOUSAND essentially testified that he had been approached by Joost and Guillette on May 4, 1972 about killing LaPolla, who was a witness against them in a case concerning

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* Due to the nature and history of this case, the statement of facts is, necessarily, greatly summarized.

the theft of M-16 rifles from a Rhode Island Armory. He testified that on May 8, 1972, in the presence of Joost, Guillette, Marrapese, Zinni, and attorney Andrew Bucci, he agreed to kill LaPolla for $5,000. Joost, Guillette, Marrapese, and Zinni were all convicted of conspiring to deprive Daniel LaPolla of a civil right, death resulting (18 U.S.C. § 241), attempting to impede and intimidate a witness (18 U.S.C. § 1503), and using a dynamite bomb to commit a felony (18 U.S.C. § 844 (h)(i)). The four defendants were sentenced to life in prison.

Following his testimony, HOUSAND was granted parole by the State of North Carolina, and was relocated by the federal government.

On November 13, 1974, JOHN HOUSAND appeared at the Office of the United States Attorney in New Haven, Connecticut, in the company of attorneys Andrew Bucci and John O'Neill, both of whom had been involved in the defense of the LaPolla case, and recanted his prior sworn testimony. Housand told the United States Attorney, Peter C. Dorsey, and an assistant, William Dow, that no May 8th meeting had ever taken place and that no one had ever approached him to kill LaPolla. He also stated that certain government agents and attorneys had not only known this, but had, in fact, procurred and encouraged his false testimony. On December 6, 1974, MR. HOUSAND repeated these charges while under oath before a federal grand jury.

In February, 1975, HOUSAND told a federal attorney and federal agents that his trial testimony was true and that he had been induced to recant by Andrew Bucci so that the four defendants in the LaPolla case could get a new trial. He stated that Bucci had promised

him a number of things, including $25,000 upon release if he was imprisoned because of his recantation. At a subsequent interview, however, he again took the position that no May 8th meeting had ever occurred.

At trial the government produced the various agents and attorneys who HOUSAND had named as knowing his trial testimony was false. They each categorically denied any such knowledge.

JOHN HOUSAND took the stand in his own behalf and admitted that his recantation and grand jury testimony were false. He testified that he had recanted out of fear of Andrew Bucci. In rebuttal, the government produced witnesses who testified that HOUSAND had, prior to his recantation, made threats that he would recant unless paid certain monies he felt were owed him by the government.

ARGUMENT

I.

Under the circumstances of this case, the Fifth Amendment privilege of Joseph Crisafi outweighed the right of the defense to his testimony where there was a sufficient basis for invoking the privilege and the defense made no showing as to the need and relevancy of such testimony.

On February 5, 1976, Joseph N. Crisafi was called as a *defense* witness at the trial of the appellant. Crisafi had appeared as a witness before the federal grand jury which had investigated the circumstances surrounding the appellant's recantation. He had testified on December 6, 1974 and on January 31, 1975. On the latter occasion he testified under a grant of immunity.

See, Response Of The United States To Appellant's Motion For The Disclosure Of Sealed Grand Jury Testimony. Prior to trial, the government had decided that it would not call Crisafi as a witness, and it supplied certain materials concerning Crisafi, including his January 31 grand jury testimony to Judge Clarie for his inspection. *See*, Supplemental Record, Letter Dated September 17, 1975.

When called to the witness stand, Crisafi was represented by counsel (Tr. 841). Crisafi indicated he had had some prior discussion with appellant's counsel and had advised him that he preferred not to testify (Tr. 841). Appellant's counsel then asked a series of general questions relating to Mr. Crisafi's grand jury testimony, and the witness responded by invoking his Fifth Amendment privilege against self-incrimination (Tr. 842-843). Appellant's counsel then stated to the Court:

> "That's all I can ask him, if the Court please. Obviously he is not going to answer any inquiry with respect to what he said before the grand jury, and he'll invoke the Fifth in respect to whether or not it is truthful. That's all, thank you" (Tr. 843).

The context of these remarks make it clear that appellant's counsel was aware that the issue was the truthfulness of the grand jury testimony.

Judge Clarie then asked for claims of law, and appellant's counsel raised the issue of the immunity which had been granted the witness (Tr. 844). The following colloquy then took place:

> "The Court: Do you claim he's granted immunity if he commits perjury before the grand jury?

> Mr. Heiman: Your Honor, in candor I can't claim that he can be immunized from perjury.
>
> The Court: So he could be incriminating himself?
>
> Mr. Heiman: Providing he testifies falsely before the grand jury, if your Honor please, yes.
>
> The Court: So therefore, his exercise of the Fifth Amendment privilege would be in order at this time, if he so chooses?
>
> Mr. Heiman: I can't argue with that . . ." (Tr. 844-845).

The witness was subsequently excused and the Court allowed a copy of Mr. Crisafi's immunized testimony to be sealed (Tr. 846-847).

On these facts the appellant claims that Crisafi's privilege had disappeared and that the government could not have used his immunized testimony against him in a trial for perjury while under the grant of immunity. Oddly enough, appellant cites this Court's decision in *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) as authority for this position. In fact, this Court stated:

> "[T]he bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all . . . [B]y perjuring himself the witness commits a *new* crime beyond the scope of the immunity. *Supra*, at 1342 (emphasis added).

This Court went on to state, regarding the subsequent use of such perjured testimony, that:

> "If the witness thwarts the inquiry by evasion or falsehood . . . such conduct is not entitled to immunity." *Supra*, at 1343-1344.

Clearly then, Crisafi *could* invoke his privilege on the basis of perjury before the grand jury. The next question, of course, is what are the proper circumstances for such invocation?

In *Hoffman* v. *United States*, 341 U.S. 479 (1951), the Supreme Court addressed the problem of the appropriateness of invoking the privilege and stated:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (*Patricia*) *Blau* v. *United States*, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States*, 244 U.S.362, 365, 37 S.Ct. 621, 61 L.Ed. 1198 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple* v. *Commonwealth*, 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege,

> it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Supra*, at 486-487.

The Court went on to emphasize that the standard is whether it is:

> "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer[s] *cannot possibly* have such a tendency" to incriminate. *Supra*, at 488 (emphasis in original).

As this Court said: "This is a test that treats the privilege with solicitude". *United States* v. *Chandler*, 380 F.2d 993, 997 (2d Cir. 1967).

In the case at bar, it is clear that everyone concerned understood the basis for Mr. Crisafi's invoking his privilege. He was claiming the privilege against self-incrimination on the basis of his grand jury testimony—the very area on which counsel for appellant desired to question him (Tr. 842-843). Outside of the general area of inquiry, no proffer was made to Judge Clarie as to what specific areas the defendant hoped to explore, or what he expected to develope or prove from the exercise. Nothing was offered to indicate whether such areas would be relevant and material to the issues of the case, or even admissible. Indeed, no real record was made for the purpose of review. Despite this, appellant, on page 15 of his brief, now claims that he believes Crisafi told the grand jury that he had been told that HOUSAND would be killed if he did not recant. Whether such testimony would be admitted is questionable since the key to a

coercion defense is not what someone else heard, but what *HOUSAND himself knew*, and the record clearly reflects that he knew of no such threat (Tr. 1223-1423) (see Section II for law of duress and coercion). It should also be noted that no attempt was made to utilize the "declarant unavailable" exception to the hearsay rule. *See*, Rule 804, Federal Rules of Evidence.

The appellant next claims error in not being allowed to pursue the contents of the December 6, 1974 testimony of Crisafi, because his Fifth Amendment privilege was waived by his voluntary testimony. While the cases cited by appellant do discuss the waiver principle, they *do not* deal with situations where the voluntary testimony may have been false. If an actual grant of immunity would not cover that situation, then certainly waiver would not cover it. *Cf.*, *United States* v. *Tramunti*, *supra*. Moreover, the appellant's claim that he was denied the opportunity to pursue and question Crisafi on the matter of the December testimony is misleading and not supported by the record. The question directed to Crisafi covered his grand jury testimony, not just the January testimony. Judge Clarie clearly would have allowed the appellant to ask specific questions to test the claim of privilege. It was appellant who chose to end the examination, not the Court (Tr. 843). Nor has any showing been made, in the record or outside of the record, that there was *anything* in the December testimony that the appellant wished to pursue.

Appellant also contends that the Court should have *required* defense counsel to "pose carefully phrased, limited questions". (Appellant's Br. 12). While we question whether Judge Clarie had the duty to require defense counsel to pursue his case in such a manner, the real question is whether:

> "from the implications of the question, in the setting in which it is asked, . . . a responsive answer to the question or an explanation of why it cannot be answered might be dangerous." *Hoffman* v. *United States*, *supra*, at 487; *see also*, *Simpson* v. *United States*, 355 U.S. 7 (1957) (Court reversed per curiam, citing *Hoffman*, contempt findings based, on innocuous questions).

Judge Clarie, of course, had to weigh the risk to the witness and his judgment ought not be lightly overturned. Furthermore, the questions put to the witness were certainly not the true areas of interest to appellant. When he chose to cease questioning the witness, it would have been an empty gesture for Judge Clarie to have attempted to compel the witness to answer them.

The appellant also contends that the Court had a duty to examine the grand jury testimony for *Brady* material. It is difficult to understand how this would have affected the proceedings since the *defense* called the witness who then invoked the privilege and gave no testimony. Surely there was a duty on the appellant to move for disclosure of the grand jury testimony. In any event, the government had provided the January transcript to Judge Clarie on September 17, 1975 (*See*, Supplemental Record, Letter dated September 17, 1975). We should assume, therefore, that Judge Clarie was cognizant of the information testified to by Crisafi and that this was a factor in his sustaining Crisafi's Fifth Amendment claim.

Finally, appellant seeks dismissal of the indictment claiming he has a right to an indictment free of false information. The government takes exception to this point as being unfounded in both law and fact. None of the cases cited by appellant support such a broad proposition. In *Mesarash* v. *United States*, 352 U.S. 1

(1956), an important government *trial* witness was found to have a long history of untruths and the issue was raised *by* the government. The Court found that the witness' credibility had been "wholly discredited" and that "the dignity of the United States Government will not permit the *conviction* of any person on tainted testimony." *Supra*, at 9 (emphasis added). In *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), the prosecutor was aware that the major witness in the case (only two witnesses appeared before the grand jury) had lied in important respects. The defendants subsequently stood trial on that indictment and the witness appeared against them. In contrast, in this case the government had never been made aware that Crisafi had given false information. In response to an inquiry by Judge Clarie, the government informed him, on June 2, 1975, that Crisafi would not be used as a witness and that this decision rested on a judgment call by one of the government attorneys. *See*, Supplemental Record, Letter dated June 2, 1975. In a subsequent letter to California authorities, it was pointed out that the decision that Crisafi would not be a trial witness was *not* based on the veracity of his information. *See*, Supplemental Record, Letter dated June 17, 1975.

To continue, in *United States* v. *Gallo*, 394 F. Supp. 310 (D. Conn. 1975), the major witness had appeared before a grand jury and given false testimony. He subsequently recanted portions of his testimony and reaffirmed the rest before the same grand jury. That grand jury then returned an indictment. However, the prosecutor, for technical reasons, sought a superseding indictment from a new grand jury. While he gave the new grand jury *all* the witness' testimony, in transcript form, he did not tell them that portions of the first testimony had been false. The Judge reasoned that the new grand

jury might not have returned the indictment, or at least might have demanded to hear the witness in person before returning the indictment, had they been made aware of his earlier perjury. Clearly, the case bears no relation to the facts in this case. Likewise, *Berger* v. *United States*, 295 U.S. 78 (1935) has no relevancy at all, and *United States* v. *Polesi*, 416 F.2d 573 (2d Cir. 1969), involves a *conviction* tainted by perjury, and not an *indictment*, which is the question here. It must be stressed that the jury in this case *never* heard any testimony from Joseph Crisafi.

Two other cases cited by appellant, *United States* v. *Harris*, 521 F.2d 1089 (9th Cir. 1975) and *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972) deal with the question of excessive and misleading use of hearsay before the grand jury and have no application here. Indeed, that claim has never been made in this case.

If one carried the appellant's argument one step further, he could say that his indictment should be dismissed because *he* gave the grand jury false testimony, an admission he made at trial (Tr. 1306, 1309).

In contrast the Supreme Court has stated that:

> "The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974).

Also, in *Coppedge* v. *United States*, 311 F.2d 128, (D.C. Cir. 1962); *cert. denied*, 373 U.S. 946 (1963), it was held that an indictment would be upheld, even though there had been perjury before the grand jury, where there was sufficient competent evidence before the grand jury. *Supra*, at 131-132.

In sum, it is the government's belief that the appellant's arguments are meritless because Judge Clarie was correct, under the circumstances, in releasing the witness following his refusal to testify, and because there is nothing to support the contention that the government *knew*, anytime prior to his appearance at trial, that Joseph Crisafi had perjured himself. Even assuming that Crisafi would have testified on the matter claimed by the appellant, in view of HOUSAND'S own testimony and the testimony produced by the government in its case-in-chief and on rebuttal, the evidence against the appellant was so overwhelming as to preclude any argument that it could have affected the outcome of the trial.

Therefore, based on the above-stated authorities and reasons, the United States respectfully requests that the relief demanded by appellant be denied.

POINT II

The district court properly instructed the jury on the law of duress and coercion as a defense for criminal acts.

The appellant claims that Judge Clarie's instruction to the jury on the defense of coercion and duress was erroneous. In doing so he necessarily ignores the fact that Judge Clarie's charge on this point is unanimously supported by federal case law. The premier case in this area is *Shannon* v. *United States*, 76 F.2d 490 (10th Cir. 1935). There the Court stated:

> "Coercion which will excuse the commission of a criminal act must be immediate and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not

done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion . . ." *Supra*, at 493. *See also*, *Rhode Island Recreation Center* v. *Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949) (". . . the compulsion must be present, immediate, and impending . . ."); *United States* v. *Birch*, 470 F.2d 808, 812-813 (4th Cir. 1972); *United States* v. *Stevison*, 471 F.2d 143, 147 (7th Cir.), *cert. denied*, 411 U.S. 950 (1972); *United States* v. *Gordon*, 526 F.2d 406, 407-408 (9th Cir. 1975); *United States* v. *Anthony*, 145 F. Supp. 323, 339-340 (M.D. Pa. 1956); *United States* v. *Johnson*, 381 F. Supp. 210, 211-213 (D. Minn. 1974); 40 A.F.R. 2d 908 and cases cited therein.

As an example of the immediacy requirement, referred to above, the Court in *Rhode Island Recreation Center* v. *Aetna Casualty & Surety Co.*, *supra*, found that a factual basis for the defense had not been established because the person invoking the defense "was left free while he was in the building to communicate his plight to the employee who had let him in, or to one or both of the other night workers there, and to enlist their aid, and he was free to telephone the police himself, and certainly while he was opening the safe, taking out the money and walking over a mile to his rendezvous with the bandits, there was ample time for the police to provide him with protection." *Rhode Island Recreation Center* v. *Aetna Casualty & Surety Co.*, *supra*, at 605-606.

In contrast the appellant cites no cases which support his argument that threats of remote or future harm can constitute justification for criminal acts. His citation of *United States* v. *Lazaros*, 480 F.2d 174 (6th Cir. 1973) is inappropriate since the appellate Court approved of the trial Judge's instructions which followed the accepted rule. *See* Supplemental Record, Transcript of Proceedings, U.S.D.C., E.D. Mich., Nov. 15, 1971.

Furthermore, the trial record is almost devoid of any factual support for the position claimed by appellant. His claim that the record is replete with justifying facts boils down to the following:

1. that a government witness had been killed some two years previously;
2. that William Marrapese feared David Guillette;
3. that the government had placed the appellant in the Witness Protection Program;
4. that the appellant had previously been beaten by an associate of Guillette and Joost;
5. that the appellant had been held captive in Guillette's home;
6. and that he had been located by Bucci despite the best efforts of the government.

In no instance does the appellant's brief cite facts supporting a conclusion that *he* had a well-founded fear of death or serious bodily injury *at the time* he was allegedly coerced into committing unlawful acts. That Mr. Marrapese feared for himself or that government agents and attorneys took certain steps well before the events in question here can have no bearing on a defense personal to the appellant. Likewise, the appellant does not state to this Court that his claim of being held prisoner on an earlier date is questionable at best (Tr. 1397-1399), or that the beating was administered by the husband of a woman he had been seeing in Rhode Island (Tr. 1399-1400). While the appellant, in taking the stand on his own behalf, did testify that he feared Andrew Bucci (Tr. 1288, 1293), he made no mention of any specific threats or coercion, future or otherwise. In fact, his initial contact with Bucci was through long distance telephone calls (Tr. 1285-87, 1406-1407). The record reflects that

HOUSAND had freedom of movement and innumerable opportunities to seek assistance from the time of his first contact with Bucci until he was taken into custody as a material witness (Tr. 1283-1300). HOUSAND himself testified that he had been promised certain rewards in return for his recantation (Tr. 1392-1394).

Moreover, the evidence strongly supports a different motive for the appellant's actions—greed and revenge. The record is filled with testimony showing that HOUSAND was in dire financial straits in the months preceeding his recantation and that he was attempting to force the government to pay him large sums of money under the threat that he would recant his trial testimony (Tr. 1323, 1376, 1377, 1388, 1396, 1433-1434, 1483-1484).

The government realizes that the appellant is not challenging the sufficiency of the evidence, but we make mention of the above facts in order to emphasize that Judge Clarie would have been justified in refusing to allow the jury to consider the defense of coercion, much less to give the type of instruction claimed by appellant. *See*, *Shannon* v. *United States*, *supra*, at 493; *United States* v. *Anthony*, *supra*, at 339-340.

The government therefore, argues that the appellant's challenge to the coercion and duress instructions is totally without merit and should be denied.

POINT III

The appellant was not denied his right to a speedy trial, and, in the alternative, should not be permitted to raise the issue for the first time on appeal.

The appellant alleges that he has been denied his right to a speedy trial. He claims he could have been brought to trial any time during a 10 month period (he excludes one month as a result of defense motions). In view of this claim it is somewhat enlightening to review some of the pertinent dates in this case.

December 11, 1974: HOUSAND indicted with six other co-defendants (H-74-185);

December 12, 1974: HOUSAND arraigned; bond set at $100,000;

March 21, 1975: Superseding indictment returned against HOUSAND and Andrew Bucci (H-75-40); H-74-185 dismissed on motion of government;

March 31, 1975: HOUSAND arraigned; HOUSAND's attorneys, McNamara and Elliot released by Judge Clarie at *appellant's* request;

April 11, 1975: Notice of Readiness filed by government;

April 14, 24, 28, 1975: Motions filed by co-defendant Bucci;

May 5, 1975: Hearing on Bucci motions; decision reserved;

May 7, 1975: Motions filed by HOUSAND;

May 13, 1975: Appearance of Maxwell Heiman filed;

May 19, 1975: Bucci motions decided;

June 9, 1975: Hearing on HOUSAND motions; decision reserved;

June 13, 1975: HOUSAND motions decided;

September 22, 1975: H-75-40 assigned as first jury case for September 23, 1975;

September 23, 1975: put over until week of November 10th;

November 4, 1975: case continued due to Attorney Heiman being on trial in State court.

Before discussing the bearing that the above-dates have on appellant's claim, it is important to note that the Speedy Trial Act of 1974, Title 18, United States Code, Section 3161-3163, was not in effect during the period in question. Nor does the appellant claim any rights under the interim limits of Title 18, United States Code, Section 3164. The question therefore, must be decided under traditional concepts, as set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972).

The above-stated sequence shows that the government filed Notice of Readiness within six months of indictment, regardless of whether the starting point used is December 11, 1974 or March 21, 1975. Thus the government was in compliance with Rule 4 of the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases (effective April 1, 1973). Thereafter, motions were filed by co-defendant Bucci (April 14, 24, and 28, 1975) and by the appellant (May 7, 1974). At the time appellant's motions were filed, those of his co-defendant were still unresolved. All pretrial issues were not resolved until June 13, 1975. On September 22, 1975 the case was assigned as the first jury case for

September 23, 1975. On the latter date, however the case was unable to go forward because of another trial commitment on the part of defense counsel.

At best, the appellant can only reasonably claim the period from June 13 to September 23, 1975, a period of little more than three months, in asserting a denial of his constitutional right to a speedy trial.

In support of his proposition, the appellant gives great stress to two letters sent to Judge Clarie. The first, dated March 24, 1975 and part of the record on review, certainly expresses a desire for an early trial date. However, in the *same* letter, the appellant requested that Judge Clarie appoint *new* counsel to represent him. The strength of a request for an early trial date must certainly be viewed with some skepticism when coupled with a request that will necessarily delay the proceedings. *Cf. Barker* v. *Wingo*, *supra*, at 531. The second demand upon which appellant relies, dated June 30, 1975, is, we submit, of even less significance since, when read in context, it implies that the appellant felt that, *regardless of how the case was resolved*, the government should fulfill certain obligations he believed were due him. It is also important to note that the appellant makes no claim that the delay was deliberate and intended to gain an advantage or hamper the defense. Nor does he claim any prejudice arising out of the delay, or that the conspiracy and perjury charges were not serious and complex. *See*, *Barker* v. *Wingo*, *supra*, at 351; *See also*, *United States* v. *Infanti*, 474 F.2d 522, 527-528 (2d Cir. 1973).

In contrast to the facts in this case, in *United States* v. *Strunk*, 412 U.S. 434 (1973), cited by appellant in support of his position, there was a ten month hiatus between indictment and trial of a defendant for car

theft. *Nothing at all had taken place* between indictment on May 26, 1970 and arraignment on February 9, 1971, during which period the defendant was without counsel. *United States* v. *Strunk*, 467 F.2d 969, 970-971 (7th Cir. 1972). The facts of the *Strunk* case, we submit, clearly distinguish it from the case at bar, and it is therefore of dubious value in offering support to appellant's argument. It is the government's position that the weakness of the appellant's "demands", coupled with lack of *any* prejudice or bad faith on the government's part, greatly outweigh, when balanced as suggested in *Barker* v. *Wingo*, *supra*, at 533, the three month delay in bringing the appellant to trial.

Additionally, this Court has recently held that:

> "[a]lthough defendants and their counsel are allowed considerable leway in delaying their demand for a speedy trial before the trial court, . . . the issue must be raised at some point. *A complete failure* to raise it in the trial court . . . precludes our consideration of the issue on appeal . . ." *United States* v. *Canniff*, 521 F.2d 565, 573 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976) (citations omitted; emphasis added).

We therefore contend that by failing to properly raise this issue at the trial court, the appellant is, as in *Canniff*, precluded from raising it for the first time before this Court.

Based on the above stated reasons and citations, the United States respectfully requests that appellant be denied the relief sought.

POINT IV

The questions and answers forming the basis for Counts Two and Four, taken in context, were sufficiently precise to support conviction, and, in the alternative, the concurrent sentence doctrine should preclude review of the issue.

The appellant alleges that his convictions on Counts Two and Four of the indictment (Criminal No. H-75-40) should be reversed because the questions put to the appellant were imprecise. The government views this claim as being totally specious. The appellant looks at the questions alone, without the context of the accompanying paragraphs, and ignores the answers given in response. The appellant also ignores paragraphs 1 through 7 of Count One. Those paragraphs make it clear that HOUSAND had been a government witness at two trials involving the same facts and issues, but different defendants. Paragraph 3 states that HOUSAND sworn under oath that his testimony given in those trials was truthful and accurate. Paragraphs 5, 6 and 7 state that HOUSAND had subsequently sworn that his testimony was false, and that government attorneys and agents were aware of the falsity at the time he had testified and, indeed, had procured and encouraged it. Taken in this context, the questions and answers forming the basis for Count Two are, we submit, precise and well defined. HOUSAND was asked whom he had told, or in whose presence he had said, that his testimony was false. In response he gave five names. Certainly the meaning and import of the questions were clear to the appellant. While the next question, about Marshal Paul Connolly, when taken alone is meaningless, when taken in context it is clear and unambiguous. *Cf.*, *United States* v. *Andrews*, 370 F. Supp. 365, 367-369 (D. Conn. 1974).

Count Four, which again realleges and incorporates paragraphs 1 through 7 of Count One, contains, in paragraph 3, extensive questions and responses pointing out the government attorney's concern that the appellant, in his appearances as a government witness, tell only the truth and that *any* false testimony would not be tolerated. If one focuses only on the work "it" in paragraph 5, as suggested by appellant, there would certainly be ambiguity, but, taken in context, the question and answer clearly mean that MR. HOUSAND was falsely testifying with the knowledge of the government's attorney, notwithstanding the strained attempts of the appellant to now cast them in a favorable light. *See, United States* v. *Razzaia*, 370 F. Supp. 577, 578-579 (D. Conn. 1973); *United States* v. *Ceccerelli*, 350 F. Supp. 475, 478 (W.D. Pa. 1972).

Furthermore, the appellant is challenging Counts Two and Four. However, the sentences on Counts Two and *Three* (an unchallenged Count) are concurrent with each other and with Count Four. The effective sentence being ten years. Assuming that the Court denies appellant relief on the other issues he raises, an adverse decision for the government on the two counts challenged here, would still leave the appellant with an effective ten year sentence under Counts One and Three. In that event, the government would urge the Court to exercise its discretion and refuse review on this issue under the concurrent sentence doctrine. *See, e.g., United States* v. *Romano*, 382 U.S. 136, 138 (1965); *United States* v. *Gainer*, 460 F.2d 176 (2d Cir. 1972), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Vasquez*, 468 F.2d 565 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

For the above-stated reasons, therefore, the United States respectfully requests that this Court affirm the convictions or refuse to consider the issue.

POINT V

The appellant knowingly and voluntarily waived his constitutional rights in consenting to being interviewed by Government agents, and, having failed to raise the issue below, should be precluded from claiming it before this court.

The appellant claims a violation of his Sixth Amendment rights—an issue never raised below—because of trial testimony concerning statements he made to government representatives subsequent to his indictment. It is quite clear, however, that statements which are a result of interrogation after indictment, or arrest and retention of counsel, have been held admissible, providing the accused has made an effective, knowing waiver of counsel's presence. *See, United States* v. *Messina*, 507 F.2d 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 993 (1975); *United States*, v. *Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); *United States* v. *Barone*, 467 F.2d 247 (2d Cir. 1972). Here the record shows that the appellant's two attorneys were not only present at the initiation of the first interview (Tr. 189, 209, 624, 633, 303), but also that one of his attorneys advised him of his rights (Tr. 634-635), as did one of the F.B.I. agents (Tr. 190, 625). The record indicates that the interviews took place with the consent of both the appellant and his attorneys (Tr. 189, 190, 620,627). The special agent conducting the interviews testified that the appellant signed an interrogation advice of rights form prior to the first interview (Tr. 625) and that he was orally informed of his rights prior to each subsequent interview (Tr. 627, 630). The clear import of the testimony of Special Attorney John Dowd (Tr. 186-221), Special Agent Robert Moretta (Tr. 617-643), and that of the appellant himself (Tr. 1303-1305), is that JOHN HOUSAND voluntarily,

and with full knowledge of his rights, consented to and encouraged the interviews.

Moreover, the government would also argue that his failure to make a timely motion to suppress the testimony of Attorney Dowd and Agent Moretta, has constituted a waiver of that right. Rule 12(b) of the Federal Rules of Criminal Procedure requires that motions to suppress *must* be made prior to trial. Rule 12(b)(3), F.R.Cr.P.; *see also*, Rule 41(f), F.R.Cr.P. The appellant, understandably, makes no effort to justify his failure to raise this issue prior to or at trial, and therefore has clearly waived his right to pursue the issue now. *Cf*, *United States* v. *Mauro*, 507 F.2d 802, 805-807 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1970); *United States* v. *Sisca*, 503 F.2d 1337, 1347-1349 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Ellis*, 461 F.2d 962, 969 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972). Additionally, this Court has held that it "will not consider claims of error in the trial raised for the first time on appeal unless there is a showing of manifest injustice". *United States* v. *Barillas*, 291 F.2d 743, 744 (2d Cir. 1961). We submit that the appellant has failed to meet that heavy burden.

Therefore, based on all of the above-reasons and law, the United States respectfully moves that the relief demanded by the appellant be denied.

POINT VI

The record of the case does not support appellant's claim that he was denied effective assistance of counsel, and this Court can and should resolve the issue.

Th appellant alleges that he was denied effective assistance of counsel prior to and during his trial. In doing so he brings no facts or specifics to the Court's attention in support of this allegation. Instead he states his belief that the record before this Court is insufficient to resolve his undefined claim, and asks this Court to *vacate* a lawful sentence and remand. Certa ly it is this Court, and not the appellant, who should make the decision as to whether the record is adequate or a hearing necessary. *United States* v. *Yanishefsky*, 500 F.2d 1327, 1334 (2d Cir. 1974). Rather than expedite matters, as appellant claims, his proposed procedure will *cause* needless hearings and appeals. The issue ought to be resolved by this Court, as was the case in *Yanis' sky*. It is the government's contention that a review of the record will conclusively show, regardless of appellant's ultimate claims, that he cannot bear his burden of proving that his representation was "so 'woefully inadequate' as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Yanishefsky*, *supra*, at 1333 (quoting *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969), and *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)). It is, therefore, the government's respectfully suggestion, as urged in a prior motion to this Court, that the appellant be ordered to supplement his brief in respect to the specific areas and facts upon which he bases his allegation of ineffective assistance of counsel, and that the United States be permitted to respond in like manner.

POINT VII

The district court properly instructed the jury on law of conspiracy, including the elements of the offenses alleged to by the objects of the conspiracy.

The appellant alleges that Judge Clarie's instructions failed to specify each element of the underlying violations in Count One, thereby mandating reversal. Unfortunately the appellant neglects to point out what specific elements he refers to. In support of this somewhat vague proposition, appellant cites cases holding that the elements of the unlawful object of the conspiracy need not be given *only* when the conspiracy count is accompanied by a substantive count for which those instructions are given. While the government readily concedes that the offense charged in Counts Two, Three and Four (Title 18, United States Code, Section 1623) were not the same as those named as being the objects of the conspiracy charged in Count One (Title 18, United States Code, Sections 1001 and 1503), we believe the appellant's position to be completely without basis because Judge Clarie did in fact instruct on the elements of Sections 1001 and 1503.

It is first important to re-emphasize that this is a *conspiracy* conviction, and not a conviction under Sections 1001 and 1503. *See, United States* v. *Gordon*, 242 F.2d 122, n.3 at 120 and n.4 at 127 (3d Cir.), *cert. denied*, 354 U.S. 921 (1957) (primary law given should be that of conspiracy; Court charged in statutory language on underlying offense). It should also be noted that "[o]nce the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion". *United States* v. *Bayer*, 331 U.S. 532, 536 (1947); *see also, United States* v. *Grunewald*, 233 F.2d 556, 569 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391

(1957). Moreover, where the statutory language is unlikely to confuse or mislead the jury, which we claim is the case with these statutes, it is sufficient if the pertinent aspects of the statute or statutes are simply read to the jury. *United States* v. *Malfi*, 264 F.2d 147, 151 (3d Cir.), *cert. denied*, 361 U.S. 817 (1959); *Cf.*, *Caldwell* v. *United States*, 338 F.2d 385 (8th Cir. 1964), *cert. denied*, 380 U.S. 984 (1965); *Walker* v. *United States*, 342 F.2d 22, 24-25 (5th Cir.), *cert. denied*, 382 U.S. 859 (1965).

In this case, however, Chief Judge Clarie, along with quoting the pertinent parts of the statutes (Tr. 1553-1555), also gave instructions as to the meaning of the terms "willfully" (Tr. 1561), and "knowingly" (Tr. 1567). Moreover, he also restated the underlying offenses in the factual context of how they related to the conspiracy charge (Tr. 1565-1566).

While it is obviously difficult to argue in a vacuum—the appellant having raised a broad question without defining it—it is the position of the United States that viewing the conspiracy charge as a whole, *Cf.*, *United States* v. *Nadler*, 353 F.2d 570, 572 (2d Cir. 1965), with specific reference to the factors enumerated above, Judge Clarie's charge not only specified the necessary aspects of the underlying offenses, but did so in a manner clearly intended to avoid undue confusion on the part of the jury. For these reasons, we respectfully urge that this Court affirm the conviction on Count One.

CONCLUSION

The United States respectfully suggests that the appellant received an emminently fair trial in which the evidence of guilt adduced was overwhelming. The issue he raises are in some instances untimely and are, in all instances, without true merit. Therefore, based on the reasoning and authorities stated herein, the judgments of conviction should be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1156

UNITED STATES OF AMERICA

Appellee

v.

John Anthony Housand

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn. Ave Brooklyn, N.Y.

That on the 1st day of September, 1976, deponent served the within Brief for the Appellee upon William H. Clendenen, Jr., 152 Temple Street; New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 1st day of September 1976

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977